IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 264

WILLIAM F. DROHAN AND DANIEL D. CARMELL AS TRUSTEES FOR KEESHIN MOTOR EXPRESS CO., INC., IN REORGANIZATION CAUSE 46-B-26 NORTHEAST DISTRICT OF ILLINOIS,

Plaintiffs-Respondents,

vs.

STANDARD OIL COMPANY, A CORPORATION,

Defendant-Petitioner.

STANDARD OIL COMPANY, A CORPORATION,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

MARTHA NICHOLS, AS ADMINISTRATRIX OF THE ESTATE OF FERRIS NICHOLS, DECEASED,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., A CORPORATION; AND C. A. CONKLIN TRUCK LINE, INC., A CORPORATION,

Cross-Defendants-Respondents.

BRIEF IN REPLY TO ANSWER BRIEF OF RESPONDENTS DROHAN AND CARMELL, AS TRUSTEES.

RICHARD P. TINKHAM,
JOHN F. BECKMAN, JR.,
Attorneys for Petitioner Standard Oil Company.
WALTER C. WILLIAMS,
Attorney for Petitioner Martha Nichols as Administratrix.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States.

Your petitioners, Standard Oil Company, a corporation, and Martha Nichols, as Administratrix of the Estate of

Ferris Nichols, deceased, for reply to the answer brief of the respondents, Drohan and Carmell, as Trustees, would respectfully show the Court as follows:

The petitioners' original brief contains replies to Propositions I and II (a), as set forth in the brief of the respondents, Drohan and Carmell, as Trustees. This reply, therefore, will be addressed solely to Proposition II (b), set forth in respondents' brief, page 7.

The answer given by the respondents, Drohan and Carmell, as Trustees, to Proposition III, set forth in the brief in support of the petition (page 17), is that under the law of Indiana, the petitioners were guilty of negligence as a matter of law when the vehicle belonging to the petitioner Standard and being driven by Ferris Nichols collided with the vehicle belonging to respondents and that, therefore, the instruction was correct. In support of this proposition, the respondents rely upon three Indiana cases—*Pennsylvania R. Co.* v. *Huss,* 96 Ind. App. 71, 180 N. E. 919; *C. C. C. & St. L. Ry. Co.* v. *Gillespie,* 96 Ind. App. 535, 173 N. E. 708, and *Pitcairn* v. *Honn,* 109 Ind. App. 428, 32 N. E. (2) 733.

It will be observed that these cases are all cases from the inferior appellate tribunal of the State of Indiana. The proposition which respondents claim was announced in these cases has been criticized by the Supreme Court of Indiana and, in fact, repudiated and overruled by that court. The Honn case itself recites the criticism of the previous decisions by the Supreme Court.

In the subsequent case of *Opple* v. *Ray* (1935), 208 Ind. 450, 195 N. E. 81, 84, the Supreme Court of Indiana said in repudiating both the Huss and Gillespie cases:

> "In both cases it was held that to drive an automobile at such a speed that it could not be stopped within the distance that objects could be seen ahead of it was contributory negligence as a matter of law,

and the question of proximate cause is not properly submitted to the jury. Many cases from many jurisdictions are cited to support the proposition, but it seems to us that the statement is too broad."

Likewise, in the later case of *New York Central R. Co.* v. *Casey* (1938), 214 Ind. 464, 14 N. E. (2) 714, 717, the Supreme Court of Indiana repudiates the proposition that one who collides with another vehicle is guilty of negligence as a matter of law, and limits the scope of the Huss and Gillespie decisions solely to the point that in neither case had the defendant railroad company been shown to have been guilty of any negligence.

A further example of the resort to simulation by respondents in an attempt to support an incorrect opinion is the incomplete quotation from *Opple* v. *Ray*, 208 Ind. 450, 195 N. E. 81, 85, appearing at page 10 of their brief. We set out herewith the entire quotation and have italicized the omitted portion:

> "A driver is bound to observe the red tail-light of a car in front of him proceeding in the same direction, *and, still, he is not necessarily chargeable with negligence should he collide with such a car if it should stop suddenly and unexpectedly and without signaling.*"

Respondents likewise rely on the fact that in a general instruction, the trial court told the jury that the operator of the Standard vehicle was required to exercise the care which a reasonable and prudent person would exercise under the same or similar circumstances. They urge that the instructions should be considered as a whole and that this general instruction cures the more specific instruction as to the duty of the operator of the vehcile under certain circumstances therein defined. They deem this proposition too elemental for the citation of authority. Unfortunately for respondents, this is not the law of Indiana.

As set out in petitioners' original brief, when an instruction concerning the obligation of a motor vehicle operator under certain specific circumstances is given, and that instruction is erroneous, it cannot be cured by others which state the rule correctly because "every time the Court tells the jury in other instructions that the driver is required to use the care that an ordinarily prudent person would exercise in like circumstances, the jurors, if obedient to the oath, are bound to observe" that reasonable care means the specific obligations previously defined. (*Martin* v. *Lilly* (1919), 188 Ind. 139, 121 N. E. 443, 445, (Petitioners' Brief, p. 12); and *Rump* v. *Woods* (1912), 50 Ind. App. 347, 98 N. E. 369, 371, (Petitioners' Brief, p. 19.))

It is not the law of Indiana, as respondents would have this Court believe, that a motor vehicle operator colliding with another vehicle on the highway is guilty of negligence as a matter of law. It is the law that the operator of a vehicle is charged with the duty to exercise reasonable care to avoid colliding with another vehicle on the highway, whether such care has reference to the duty to keep a lookout or the duty to restrict speed. This is the only duty under the law of Indiana. (*Heiny* v. *Pennsylvania R. Co.* (1943), 221 Ind. 367, 47 N. E. (2) 145, Petitioners' Brief, pp. 16 and 21.)

Respondents, by failing to answer or comment upon the propositions and data contained in petitioners' brief (p. 8, *et seq.*) pertaining to the substance and importance of the question, have inferentially admitted that, if petitioners are correct as to the law of Indiana, the decision of the Circuit Court of Appeals will affect a substantial and important number of cases in the Indiana federal courts. Under the rules of law as announced by the Circuit Court of Appeals for the Seventh Circuit in this case, federal court litigants in motor vehicle cases must "regularly and continuously observe the highway * * * so as to dis-

cover any vehicle * * *," and so restrict the speed of their vehicles as "to avoid colliding with any * * * vehicle." If the operator suffers a collision to occur, he is thus guilty of negligence on two grounds as a matter of law. On the other hand if by fortuitous circumstance the operator finds himself in an Indiana state court, his conduct will be measured by that of a reasonable and prudent person under similar circumstances. Substantially different results in the two court systems are inevitable if this decision is permitted to stand.

Commenting upon the application of the case of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, this Court said in the landmark case of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 89 L. Ed. 2079, 2086:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

Petitioners, therefore, respectfully submit that this is a proper case for the granting of the writ, and that upon review the judgment of the Circuit Court of Appeals be reversed.

Respectfully submitted,

RICHARD P. TINKHAM,
JOHN F. BECKMAN, JR.,
Attorneys for Petitioner Standard Oil Company.
WALTER C. WILLIAMS,
Attorney for Petitioner Martha Nichols as Administratrix.